

No. 05-363

IN THE SUPREME COURT OF THE STATE OF MONTANA

2006 MT 112

STATE OF MONTANA,

Plaintiff and Respondent,

v.

KRISTI ANNE MOODY,

Defendant and Appellant.

APPEAL FROM: The District Court of the Thirteenth Judicial District,
 In and For the County Yellowstone, Cause No. DC 2002-478,
 Honorable Ingrid G. Gustafson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Penelope S. Strong, Chief Public Defender; Tanya Dvarishkis,
Deputy Public Defender, Billings, Montana

For Respondent:

Honorable Mike McGrath, Attorney General; Joslyn M. Hunt,
Assistant Attorney General; Helena, Montana

Dennis Paxinos, County Attorney, Billings, Montana

Submitted on Briefs: March 15, 2006

Decided: May 23, 2006

Filed:

Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

¶1 Montana's Thirteenth Judicial District Court, Yellowstone County, sentenced Kristi Anne Moody to a two-year deferred sentence based on three separate charges. Prior to sentencing, Moody filed objections to several probation conditions recommended in the presentence investigation report (PSI). The District Court nonetheless imposed most of the proposed conditions. Moody now appeals. We reverse in part and affirm in part.

¶2 We restate the issues as follows:

¶3 1. Does requiring a probationer to keep her home open and available to the probation officer at all times violate Montana law?

¶4 2. Did the District Court properly impose a travel restriction as a condition of Moody's probation?

BACKGROUND

¶5 In responding to a report on May 7, 2004, Officers Wells and Ostermiller of the Laurel Police Department came across a gray van that had reached a complete stop in the middle of an intersection. Officers Wells and Ostermiller approached the van and found Moody, who appeared either asleep or passed out. The officers removed Moody from the van and verified that she did not need medical attention. Smelling of alcohol and unsteady on her feet, Moody swore at the officers and refused to perform any field sobriety tests or provide a breath alcohol sample. Moody could not find the registration for the vehicle and stated that she did not have any car insurance. The officers arrested Moody, placing her in handcuffs. When they tried to get Moody into the backseat of the

patrol vehicle, Moody kicked at Officer Wells, striking him in the face with such force that she left a visible boot imprint. Eventually the officers restrained Moody and transported her to the Yellowstone County Detention Facility.

¶6 The State charged Moody by information with Count I, assault on a police officer, a felony in violation of § 45-5-210(1)(a), MCA; Count II, driving under the influence of alcohol or drugs, a misdemeanor in violation of § 61-8-401, MCA; and Count III, driving without required motor vehicle insurance, a misdemeanor in violation of § 61-6-302, MCA.

¶7 Moody pled guilty to all three counts pursuant to a plea agreement. Prior to sentencing, Probation Officer Barry Ivanoff prepared the PSI with recommendations for the conditions of Moody's probation. Moody filed an objection to several of the proposed conditions, including 2 and 3, which read as follows:

2. The Defendant will not change [her] place of residence without first obtaining permission from [her] Probation/Parole Officer. The residence must be approved by [her] Probation & Parole Officer. *The Defendant will make the home open and available for the Probation & Parole Officer to visit as required per policy.* The Defendant will not own dangerous/vicious animals such as guard dogs, use perimeter security doors, or refuse to open the door of the residence when requested. [Emphasis added.]
3. The Defendant shall not leave [her] assigned district without first obtaining written permission from [her] Probation & Parole Officer.

¶8 Moody objected to the requirement that she make her home "open and available" to her probation officer on the grounds that this condition obviated the reasonable suspicion requirement for searches of probationers' homes, and thus violated her constitutional rights of privacy and protection from unreasonable search and seizure.

Moody also objected to the travel restriction, arguing that it inhibited her constitutional rights to travel and work and her freedom of association; she also argued that the restriction insufficiently related to her rehabilitative needs and did not protect society.

¶9 At the sentencing hearing, Moody called Officer Ivanhoff to testify regarding the probation conditions he recommended. After Moody and the State argued their respective positions, the District Court issued the sentence, imposing both the second and third probation conditions. Moody appeals.

STANDARD OF REVIEW

¶10 We review a District Court’s criminal sentence for legality only. *State v. Eaton*, 2004 MT 283, ¶ 11, 323 Mont. 287, ¶ 11, 99 P.3d 661, ¶ 11 (citations omitted).

DISCUSSION

¶11 **1. Does requiring a probationer to keep her home open and available to the probation officer at all times violate Montana law?**

¶12 Moody argues that Condition 2 of her probation, which requires that she keep her “home open and available for the Probation & Parole Officer to visit” violates the *reasonable cause standard* applied by this Court to searches of probationers’ residences, as well as Rule 20.7.1101(7), ARM, governing conditions on probation. We agree.

¶13 A search of a person may be conducted pursuant to a valid search warrant or in accordance with a judicially recognized exception. Section 46-5-101, MCA. This Court has held time and again that a probation officer may search a probationer’s residence without a warrant so long as the officer has reasonable cause for the search. *See State v. Roper*, 2001 MT 96, ¶ 12, 305 Mont. 212, ¶ 12, 26 P.3d 741, ¶ 12; *State v. Beaudry*

(1997), 282 Mont. 225, 228, 937 P.2d 459, 460-61; *State v. Burchett* (1996), 277 Mont. 192, 195, 921 P.2d 854, 856; *State v. Boston* (1995), 269 Mont. 300, 305, 889 P.2d 814, 817; and *State v. Burke* (1988), 235 Mont. 165, 169, 766 P.2d 254, 256-57. “The ‘reasonable cause’ standard is substantially less than the probable cause standard required by the Fourth Amendment because of the probationer’s diminished expectation of privacy” *Burchett*, 277 Mont. at 195-96, 921 P.2d at 856 (citing *Burke*, 235 Mont. at 169, 766 P.2d at 256-57, and *Griffin v. Wisconsin* (1987), 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709). Rule 20.7.1101(7), ARM, further underscores this precedent by permitting a warrantless search of a probationer’s or parolee’s person, vehicle or residency only “upon reasonable cause.” Rule 20.7.1101(7), ARM (emphasis added).

¶14 In responding to Moody’s appeal of Condition 2, the State articulates contradictory reasoning. On the one hand, the State insists that requiring a probation officer to have reasonable cause before conducting a home visit defeats the supervisory purpose of probation, thereby heightening a probationer’s privacy interest to a level inconsistent with conditional liberty status. On the other hand, the State concedes that, by law, a probation officer must have reasonable cause to conduct a warrantless search of a probationer’s home. The State appears to be arguing that even though Condition 2 does not explicitly require “reasonable cause” before an officer conducts a search, in practice, this standard must be satisfied. The trial judge more or less asserted the same position at the sentencing hearing by stating that Condition 2 is “still subject to [officers] having reasonable suspicion.”

¶15 Although Condition 2 mandates that Moody “will make the home open and available for the Probation & Parole Officer to visit *as required per policy*,” we conclude that the condition must narrowly articulate that “as required per policy” means “upon reasonable cause.” We reverse and remand to the District Court for further proceedings consistent with this opinion.

¶16 2. Did the District Court properly impose a travel restriction as a condition of Moody’s probation?

¶17 Moody also insists that the District Court erred by imposing Condition 3, requiring that she obtain written permission from her probation officer before leaving her assigned district. Although Moody concedes that this condition does not absolutely limit her travel beyond the multi-county district, she nonetheless argues that the condition improperly places her rights at the mercy of the supervising officer. We disagree.

¶18 Since parole is a form of punishment, parolees do not enjoy the absolute liberty afforded every citizen; rather, they are subject to conditional liberty properly dependent on special restrictions. *State v. Boston* (1995), 269 Mont. 300, 304-05, 889 P.2d 814, 816 (citation omitted). We have held that for a condition to be reasonably related to the objectives of rehabilitation and protection of the victim and society, a sentencing condition “must have some correlation or connection to the underlying offense for which the defendant is being sentenced.” *State v. Malloy*, 2004 MT 377, ¶ 8, 325 Mont. 86, ¶ 8, 103 P.3d 1064, ¶ 8. This of course requires analyzing the condition in the context of the charged offense. To be legitimate, the condition must both rehabilitate the defendant and help protect society from further similar conduct. *Malloy*, ¶ 8.

¶19 In this case, the offense resulted from Moody's admitted problem with alcohol. Unless Moody maintains sobriety (which she apparently has been working hard to do since this offense), she is likely to re-offend. The deferred sentence permitted Moody the opportunity to address her chemical dependency under the *supervision* of the probation office. This supervision properly includes a travel restriction to allow Moody's probation officer to effectively keep track of her whereabouts in order to ensure that she remains on course with treatment. The travel restriction does not prohibit Moody from leaving her assigned district, it merely requires written permission from probation. In light of our mandate that a probation restriction both rehabilitate the defendant and help protect society from further similar conduct, we conclude that the District Court properly imposed Condition 3.

¶20 Reversed in part and affirmed in part.

/S/ W. WILLIAM LEAPHART

We concur:

/S/ KARLA M. GRAY
/S/ JAMES C. NELSON
/S/ BRIAN MORRIS

Justice John Warner concurs.

¶21 I concur in the Court's decision that condition No. 2, as quoted in the Court's Opinion at ¶ 7, is so hopelessly confusing that it cannot stand. I fear that the Court's Opinion may add to the confusion.

¶22 As noted by the Court at ¶ 13, a probation officer may search a probationer's residence without a warrant so long as the officer has reasonable cause for the search. If deemed relevant and necessary, this fact should be included as a condition imposed on a probationary sentence.

¶23 I am of the opinion that, as a condition of probation, the sentencing court may require that a probationer's place of residence be approved, and likewise that any change of residence must be approved in advance. While a probation officer needs at least reasonable cause to enter and search a probationer's residence, I would conclude that it is legal, with or without reasonable cause, to require a probationer to answer the door at their residence and personally face a probation officer. This may be deemed necessary to assure that the probationer has not absconded.

¶24 I am also of the opinion that the residence of a probationer may be required to be open and available to a probation officer at all times for the purpose of making sure that the probationer is where he or she is required to be. Thus, guard animals, security doors, security gates, and other obstructive devices or structures may be prohibited.

¶25 I concur with the Court that a travel restriction may be included as a condition of a probationary sentence.

/S/ JOHN WARNER